

Stamford College Bhd v Iris Corp Bhd

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HIGH COURT (KUALA LUMPUR) — CIVIT SUIT 22NCC-126-01 OF
2013

ABU BAKAR JAIS JC

18 SEPTEMBER 2013

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Civil Procedure — Costs — Security for cost — Application for — Whether plaintiff would be able to pay defendant's cost if defendant was held not liable — Whether amount requested as security for costs was fair amount — Companies Act 1965 s 351(1)

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Civil Procedure — Summary judgment — Application for — Triable issues — Claim on balance of purchase price — Counterclaim — Whether plethora of issues raised by defendant serious bona fide issues — Whether issues could only be determined in trial — Whether fit and proper case for summary judgment — Rules of Court 2012 O 14 r 1

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Civil Procedure — Striking out — Application to strike out action — Whether appropriate or safe to prefer defendant's contentions or make conclusive finding at this stage of proceedings — Whether plain and obvious case for striking out — Rules of Court 2012 O 18 r 19

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Companies and Corporations — Shares — Sale of — Whether value of shares to be transferred triggered operation of s 132C of the Companies Act 1965 — Whether possible to make conclusive finding that substantial undertaking or property had been disposed of at this stage of proceedings

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The plaintiff had entered into an agreement for the sale of 51% of its fully paid up ordinary shares to the defendant for the price of RM2.5m. After the defendant had paid the 10% deposit of RM250,000, the plaintiff had duly executed the transfer of the shares in the defendant's favour. When the defendant failed to pay the balance of the purchase price, the plaintiff filed the present action. The defendant counterclaimed, inter alia, for the wrongful termination of the agreement and for the alleged misrepresentation by the plaintiff, which had led the defendant to enter into the agreement. The plaintiff then filed an application for summary judgment pursuant to O 14 r 1 of the Rules of Court 2012 ('ROC') on the grounds that there were no triable issues to its claim against the defendant. The defendant contended that there were triable issues, such as, inter alia, the rights of the parties to this agreement in the

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A event a due diligence exercise, as provided for in the agreement, was carried out and the exercise produced findings that were not favourable to the defendant; the defendant's counterclaim for misrepresentation in respect of the sale of shares; the issue as to whether the agreement was terminated and if so whether the termination was without valid grounds. The defendant in turn filed an
B application to strike out the plaintiff's writ and statement of claim pursuant to O 18 r 19 of the ROC. In this application, the defendant submitted that since the value of the transaction ie the sale of the shares by the plaintiff amounted to RM17,500,000 as against the plaintiff's issued paid-up capital of RM40,000,000, the operation of s 132C of the Companies Act 1965 ('the
C Act') was triggered, which required a general meeting to be held by the plaintiff before the disposal of the shares. It was therefore the defendant's case that since the plaintiff had not held such a general meeting, the non-compliance of s 132C of the Act would render the consideration or object of the agreement to be unlawful under s 24 of the Contracts Act 1950. Hence, the defendant
D claimed that the plaintiff's writ or statement of claim was baseless, scandalous and frivolous and otherwise an abuse of the process of this court. The plaintiff opposed the defendant's application for striking out on the grounds that s 132C of the Act was not applicable as the price of the shares was only RM2.5m. The defendant also filed another application for security of costs
E pursuant to s 351(1) of the Act, on the grounds that the plaintiff was impecunious and that its shares were delisted from Bursa Malaysia because of this. The plaintiff opposed this application and submitted that it had made full and frank disclosure of its financial position to the defendant before the
F agreement was executed and that had the defendant fulfilled its obligations under the agreement, the plaintiff would not be in this current position. The present judgment related to all three applications, which were heard on the same day.

G **Held:**

- (1) In the light of the due diligence clause in the agreement, the assumption of liability by the defendant purchaser would only be good upon the conclusion of the due diligence exercise. Thus would arise the question to be determined as to what would be the rights of the parties to this
H agreement in the event the due diligence results were not favourable to the defendant. In determining this issue other questions would necessarily arise such as whether the defendant could re-negotiate the terms of the agreement it had entered into or even exercise its right not to continue fulfilling its obligations under the present agreement. Further,
I there was a counterclaim by the defendant arising from the plaintiff allegedly misrepresenting that it was involved in a profitable business. These issues were serious bona fide issues that were not mere denials to the statement of claim. The answer to these issues could only be determined in a trial. It is settled law that the defence only needed to raise

a single triable issue and in this case there were a plethora of issues for trial. As such, the present case was not a fit and proper case for summary judgment (see paras 14–18).

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- (2) Whether the value of the shares was RM17.5m or RM2.5m was an issue not to be determined at this stage and parties were at liberty to call witnesses to prove their case one way or the other. At this stage of the proceedings, it would not be possible to make a conclusive finding as to whether a substantial undertaking or property had been disposed of by the plaintiff company for the purposes of s 132C of the Act. Both the plaintiff's and the defendant's arguments were more or less of equal weight and at this juncture it would neither be appropriate nor safe to conclude that the defendant's submissions should be preferred over the plaintiff's contention. Further as there were three methods provided in s 132C for arriving at the substantial value of the plaintiff's property to be disposed of the defendant could not say only one method applied. Thus, this was not a plain and obvious case for striking out the plaintiff's writ and statement of claim (see paras 35–36, 42–43 & 46).

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- (3) Although the defendant was at all material times aware of the plaintiff's financial position, it was only after the plaintiff filed the present suit that it had to show that it had the means of satisfying the costs of the defendant in the event its claim was dismissed by the court. The documentary proof indicated that the plaintiff and most of its subsidiaries profit was in the negative. Consequently, the plaintiff would be unable to pay the defendant's cost in the event that the defendant was held not liable. The defendant only needed to show some proof to assert security as needed from the plaintiff and in the present case there was sufficient proof for application. Further, the amount requested of RM250,000 as security for costs was a fair amount having regard to the amount claimed in the defendant's counterclaim. In the event the security for costs was not provided as ordered, the defendant was granted liberty to apply to strike out the writ and statement of claim (see paras 65–66, 68 & 70–71).

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[Bahasa Malaysia summary]

Plaintif telah memasuki perjanjian untuk jualan 51% saham biasa berbayar penuhnya kepada defendan berharga RM2.5 juta. Selepas defendan membayar deposit 10% daripada RM250,000, plaintif telah menyempurnakan pemindahan saham-saham bagi pihak defendan. Apabila defendan gagal membayar baki harga belian, plaintif telah memfailkan tindakan ini. Defendan memasukkan tuntutan balas, antara lain, untuk penamatan salah perjanjian dan untuk salah nyata yang dikatakan oleh plaintif, yang membawa kepada defendan memasuki perjanjian itu. Plaintif kemudian telah memfailkan permohonan untuk penghakiman terus menurut A 14 k 1 Kaedah-Kaedah Mahkamah 2012 ('KKM') atas alasan bahawa tiada isu yang perlu dibicarakan

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- A dalam tuntutannya terhadap defendan. Defendan berhujah bahawa terdapat isu-isu yang perlu dibicarakan, seperti, antara lain, hak-hak pihak-pihak kepada perjanjian ini sekiranya amalan usaha wajar, seperti mana diperuntukkan dalam perjanjian, dilaksanakan dan amalan itu menghasilkan penemuan yang tidak berpihak kepada defendan; tuntutan balas defendan
- B untuk salah nyata berkaitan jualan saham; isu sama ada perjanjian itu telah ditamatkan dan jika begitu sama ada penamatan itu adalah tanpa alasan yang sah. Defendan kemudian telah memfailkan permohonan untuk membatalkan writ dan pernyataan tuntutan plaintif menurut A 18 k 19 KKM. Dalam permohonan ini, defendan berhujah bahawa oleh kerana nilai transaksi, iaitu
- C jualan saham oleh plaintif berjumlah RM17,500,000 berbanding keluaran modal berbayar plaintif berjumlah RM40,000,000, s 132C Akta Syarikat 1965 ('Akta') adalah terpakai, yang menghendaki satu mesyuarat agung diadakan oleh plaintif sebelum jualan saham-saham itu. Oleh itu ia adalah kes defendan kerana plaintif tidak mengadakan mesyuarat agung tersebut,
- D ketidakpatuhan s 132C Akta akan menyebabkan balasan atau tujuan perjanjian itu menyalahi undang-undang di bawah Akta Kontrak 1950. Justeru itu, defendan berhujah bahawa writ atau pernyataan tuntutan plaintif tidak berasas, bersifat skandal dan remeh dan selainnya satu penyalahgunaan proses mahkamah. Plaintif membantah permohonan defendan untuk
- E pembatalan atas alasan bahawa s 132C Akta tidak boleh terpakai kerana harga saham-saham itu hanya RM2.5 juta. Defendan juga telah memfailkan satu lagi permohonan untuk jaminan kos menurut s 351(1) Akta, atas alasan bahawa plaintif tidak berwang dan bahawa saham-sahamnya telah dinyahsenaraikan dari Busa Malaysia kerana ini. Plaintif membantah permohonan ini dan
- F berhujah bahawa dia telah membuat pendedahan yang lengkap dan jujur tentang kedudukan kewangannya kepada defendan sebelum perjanjian itu dilaksanakan dan bahawa jika defendan telah menunaikan tanggungjawabnya di bawah perjanjian itu, plaintif tidak akan berada dalam keadaan ini. Penghakiman ini berkaitan kesemua tiga permohonan, yang telah didengar
- G pada hari yang sama.

Diputuskan:

- H (1) Berdasarkan klausa usaha wajar dalam perjanjian itu, andaian liabiliti oleh defendan pembeli hanya baik setelah mendapat kesimpulan daripada amalan usaha wajar. Oleh itu akan timbul persoalan yang perlu ditentukan berhubung hak-hak pihak-pihak kepada perjanjian ini jika hasil usaha wajar tidak menyebelahi defendan. Dalam menentukan isu ini persoalan lain perlu ditimbulkan seperti sama ada defendan boleh
- I berunding semula terma-terma perjanjian yang dimasukinya malah melaksanakan haknya untuk tidak terus memenuhi tanggungjawabnya di bawah perjanjian ini. Selanjutnya, terdapat tuntutan balas oleh defendan yang timbul daripada plaintif mengatakan berlaku salah nyata di mana ia terlibat dalam perniagaan yang menguntungkan. Isu-isu

tersebut adalah isu-isu bona fide serius yang bukan hanya penafian semata-mata terhadap pernyataan tuntutan itu. Jawapan untuk isu-isu tersebut hanya boleh ditentukan dalam peticaraan. Adalah undang-undang tetap bahawa pembelaan hanya perlu menimbulkan satu isu yang perlu dibicarakan dan dalam kes ini terdapat pelbagai isu untuk dibicarakan. Oleh itu kes ini bukan kes yang sesuai dan wajar untuk penghakiman terus (lihat perenggan 14–18).

- (2) Sama ada nilai saham-saham adalah RM17.5 juta atau RM2.5 juta bukan satu isu untuk ditentukan di peringkat ini dan pihak-pihak bebas untuk memanggil saksi-saksi bagi membuktikan kes mereka satu cara atau sebaliknya. Di peringkat prosiding ini, adalah tidak mustahil untuk membuat penemuan konklusif berhubung sama ada akuanji atau hartanah substantif telah dijual oleh syarikat plaintif bagi tujuan s 132C Akta. Kedua-dua hujah-hujah plaintif dan defendan lebih kurang sama dan di peringkat ini ia tidak sesuai atau selamat untuk membuat kesimpulan bahawa hujah defendan akan dipilih berbanding dengan hujah plaintif. Selanjutnya oleh kerana terdapat tiga cara diperuntukkan dalam s 132C untuk menentukan nilai substantif hartanah plaintif yang akan dijual defendan tidak boleh mengatakan hanya satu cara terpakai. Oleh itu, ini bukan kes biasa dan jelas untuk pembatalan writ dan pernyataan tuntutan plaintif (lihat perenggan 35–36, 42–43 & 46).
- (3) Walaupun defendan pada setiap masa matan menyedari kedudukan kewangan plaintif, hanya selepas plaintif memfailkan guaman ini yang ia telah menunjukkan bahawa ia mempunyai sumber untuk menyelesaikan kos defendan jika tuntutannya ditolak oleh mahkamah. Bukti dokumentar itu menunjukkan bahawa plaintif dan kebanyakan daripada keuntungan subsidiarinya tidak mencukupi. Berikutan itu, plaintif tidak mampu untuk membayar kos defendan jika defendan didapati tidak bertanggung. Defendan hanya perlu menunjukkan bukti untuk menuntut jaminan seperti mana diperlukan daripada plaintif dan dalam kes ini terdapat bukti mencukupi untuk permohonan itu. Selanjutnya, jumlah yang diminta sejumlah RM250,000 sebagai jaminan untuk kos adalah jumlah yang adil dengan mengambil kira jumlah yang dituntut dalam tuntutan balas defendan. Jika jaminan untuk kos tidak diberikan seperti mana diperintahkan, defendan diberi kebebasan untuk memohon agar writ dan pernyataan tuntutan dibatalkan (lihat perenggan 65–66, 68 & 70–71).]

Notes

For cases on application for summary judgment see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 8443–8501.

For cases on application to strike out action, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 7992–8012.

- A** For cases on sale of shares, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1052–1072.
For cases on security for costs, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2414–2457.
- B Cases referred to**
Azizi Yom Ahmad & Anor v Seacera Tiles Bhd & Ors [2013] MLJU 278; [2013] 5 CLJ 605, HC (refd)
Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)
- C** *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, SC (refd)
Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd [1995] 2 MLJ 363, CA (refd)
National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300, FC (refd)
- D** *Macon Works & Trading Sdn Bhd v Phang Hon Chin & Anor* [1976] 2 MLJ 177 (refd)
Metroplex Holdings Sdn Bhd v Commerce International Merchants Bankers Bhd [2013] 4 MLJ 520, CA (refd)
Pyare Lal Bhargava v State of Rajasthan AIR 1963 SC 1094, SC (refd)
- E** *Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v Bursa (M) Securities Bhd and another appeal* [2013] 1 MLJ 158, CA (refd)
Wan Muhamad Ibrisam bin Wan Ibrahim & Ors v Opal Pyramid Sdn Bhd [2008] 6 MLJ 728; [2009] 1 CLJ 201, CA (refd)
- F Legislation referred to**
Companies Act 1965 ss 132C, 132C(1B), (c), (b), 351, 351(1)
Contracts Act 1950 s 24(a), (b)
Rules of Court 2012 O 14 r 1, O 18 r 19
- G** *Jayne Koe (SS Wong with her) (Cheah Teh & Su) for the plaintiff.*
Mark Ho (Amin Salleh and Azad Akhbar with him) (Chellam Wong) for the defendant.

Abu Bakar Jais JC:

H THE BACKGROUND

- I** [1] When this case was heard for case management in this court after taking over from another court, there were already three interlocutory applications filed; one by the plaintiff for summary judgment (encl 5) pursuant to O 14 r 1 of the Rules of Court 2012 ('RC'), two by the defendant for striking out of the writ and statement of claim (encl 10) pursuant to O 18 r 19 of the RC and for security of costs (encl 12) pursuant to s 351(1) of the Companies Act 1965 ('the Act').

[2] In saving judicial time, all three applications were heard on the same day and this judgment relates to the three applications. A

THE MATERIAL FACTS

[3] The plaintiff is the holding company of Stamford College (PJ) Sdn Bhd ('SCPJ') and Stamford College (Malacca) Sdn Bhd ('SCM') which entered into an agreement dated 4 October 2012 ('agreement') with the defendant to sell 51% of the fully paid up ordinary shares of SCPJ and SCM for the consideration price of RM2,500,000. B
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[4] The defendant paid the plaintiff 10% for deposit of RM250,000 under the agreement leaving the balance sum of RM2,250,000 and transfer of sale shares was also executed by the plaintiff for the defendant. D

[5] Despite several reminders from the plaintiff, the defendant has not made payment for the balance sum, hence this suit filed by the plaintiff.

[6] While the defendant contends among others that the balance sum has been paid in the form of advances made upon the request of the plaintiff. E

[7] The defendant also counterclaimed against the plaintiff among others for wrongful termination of the agreement and alleged misrepresentation by the plaintiff that led the defendant to enter into the agreement. F

THE PLAINTIFF'S ARGUMENTS FOR SUMMARY JUDGMENT

[8] The plaintiff submitted there are no triable issues for the defendant in the application for summary judgment for the reasons summarised as follows: G

- (a) the plaintiff had duly executed the transfer of sale shares form and caused SCPJ's and SCM's company secretary to register the said transfer of shares to the defendant; H
- (b) the share certificates had also been delivered by the plaintiff to the defendant's solicitors as stakeholders;
- (c) the defendant vide a letter agreed and undertook to pay the plaintiff the balance sum in view of the transfer of the transfer of sale shares to the defendant; I
- (d) the defendant failed to honour the undertaking;
- (e) as the undertaking was breached, the plaintiff's previous solicitor sent a

A letter of demand and in response vide an email the defendant's solicitor assured the plaintiff that the defendant is making arrangement to pay the balance sum.

B THE DEFENDANT'S SUBMISSION IN REBUTTAL

[9] The defendant says there are issues for trial and it can be summarised as follows:

- C** (a) although cl 7 (a) of the agreement provides for due diligence exercise, the same is silent on the effects and steps required in the event the exercise results in unfavourable findings;
- D** (b) what would the parties recourse be in such event;
- (c) would parties need to adjust the purchase price if the due diligence exercise reveals less or more liabilities;
- (d) balance purchase price is undetermined at this stage and must depend on the outcome of the due diligence exercise;
- E** (e) there is a counterclaim by the defendant for misrepresentation in respect of the sales of shares;
- (f) is the assurance given by the defendant for the balance purchase price subjected to the due diligence exercise;
- F** (g) is the same assurance subjected to a supplemental agreement;
- (h) is the supplemental agreement established;
- G** (i) was the supplemental agreement altered;
- (j) has the agreement been terminated;
- (k) if the agreement has been terminated can the plaintiff claim for the balance purchase price;
- H** (l) is the agreement wrongly terminated; and
- (m) in the event of wrongful termination, should the deposit be refunded to the defendant.

I THE LAW ON SUMMARY JUDGMENT

[10] It is trite law that a party to a suit needs only to show a triable issue is present in the suit for the summary judgment application to be denied and in

this regard the leading decision for summary judgment by the Supreme Court in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 is appropriate to be quoted where it is said;

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A complete defence need not be shown. The defence set up need only show that there is a triable issue.

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[11] This court is also mindful of the decision by the Federal Court in *National Company For Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 where it was decided that the issue raised by a defendant must be a bona fide issue, meaning that it cannot simply be a denial of the statement of claim of the plaintiff.

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[12] The Court of Appeal too in *Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363 had the opportunity to decide the same principle.

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THE COURT'S FINDINGS

[13] There is no dispute that cl 7 (a) of the agreement provides for due diligence and it reads:

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The purchaser hereby agrees, covenants and undertakes with the vendor that the purchaser will assume the liability of Stamford Educational Group subject to due diligence to be conducted by the purchaser.

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[14] In light of this clause in the agreement, this court without difficulty will hold that the assumption of liability by the purchaser ie defendant can only be good upon the conclusion of the due diligence.

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[15] As such, the concomitant question to be determined is what are the rights of the parties to this agreement in the event the due diligence results are not favourable to the defendant.

[16] Could the defendant then say it has the right not to continue fulfilling the obligations under the agreement? Can parties then negotiate to consider reducing the balance sum?

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- A [17] Obviously these issues need to be put on trial where witnesses should testify and most definitely because of these issues, this is not a plain and obvious case where summary judgment could be entered.
- B [18] Those issues alone would be enough for this court to say this is not a fit and proper case for summary judgment. However in the event this court is wrong regarding this finding, this court will also show there are other issues which should be decided either for the plaintiff or defendant only after trial.
- C [19] In this regard there is also the issue whether the monies advanced by the defendant apart from the deposit can be taken into account towards the settlement of the balance sum.
- [20] Also there is the issue whether parties had negotiated to enter into a supplemental agreement that will affect the operation of the agreement.
- D [21] In addition, there is the issue whether the agreement was terminated and if so whether the termination was without valid grounds.
- E [22] Further there is a counterclaim by the defendant arising from the execution of the agreement where the defendant asserts that the plaintiff had misrepresented its position in saying that the plaintiff was involved in a profitable business and a viable company engaged reputably in the education field for the defendant to think it is wise to enter into the agreement.
- F [23] This court would be in clear error to decide in the face of the issues narrated above that the plaintiff is entitled to summary judgment as requested. These issues emphatically call for witnesses to testify in court before a fair and right decision could be delivered. There are just too many issues to deny the defendant its right to call witnesses and to cross-examine the plaintiff's witnesses.
- G [24] These issues raised by the defendant, in the assessment of this court are serious issues and in any event could not be said not to be bona fide issues or issues that were raised as mere denials to the statement of claim and the case of the plaintiff as a whole.
- H [25] Above all this court only need to remind itself that according to *Bank Negara Malaysia*, the defence only need to raise a single triable issue and as explained, in this case before this court, there are plethora of issues for trial.
- I THE DEFENDANT'S ARGUMENTS FOR STRIKING OUT
- [26] The defendant's submission on striking out the writ and statement of claim of the plaintiff is summarised as follows:
- (a) the statement of claim of the plaintiff is baseless, scandalous and frivolous

and otherwise an abuse of the process of this court as the plaintiff failed to disclose that the sale of shares to the defendant was not preceded with a general meeting of the plaintiff approving such sale as required by s 132C of the Act;

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(b) there is no dispute that the plaintiff's did not hold such general meeting;

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(c) the non-compliance of s 132C of the Act renders the operation of s 24(a) and/or (b) of the Contracts Act 1950 which states that consideration or object of an agreement is lawful unless it is forbidden in law or it is of such a nature that if permitted, it would defeat any law;

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For ease of reference, the relevant provisions are stated as follows:

132C Approval of company required for disposal by directors of company's undertaking or property.

(1) Notwithstanding anything in the memorandum or articles of association of the company, the directors shall not carry into effect any arrangement or transaction for —

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(a) the acquisition of an undertaking or property of a substantial value; or

(b) the disposal of a substantial portion of the company's undertaking or property, unless the arrangement or transaction has been approved by the company in a general meeting.

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(1A) For the purpose of subsection (1), in the case of a company where all or any of its shares are listed for quotation on the official list of a Stock Exchange as defined in the Securities Industry Act 1983, the term 'substantial value' or 'substantial portion' shall mean the same value prescribed by the provisions in the listing requirements of the Exchange —

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(a) which relates to acquisitions or disposals by a company or its subsidiaries to which such provision applies; and

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(b) which would require the approval of shareholders at a general meeting in accordance with the provisions of such listing requirements.

(1B) In the case of any company other than a company to which subsection (1A) is applicable, an undertaking or property shall be considered to be of a substantial value and a portion of the company's undertaking or property shall be considered to be a substantial portion if —

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(a) its value exceeds twenty-five per centum of the total asset of the company;

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(b) the net profits (after deducting all charges except taxation and excluding extraordinary items) attributed to it amounts to more than twenty-five per centum of the total net profit of the company; or

- A** (c) its value exceeds twenty-five per centum of the issued share capital of the company, whichever is the highest.
- (2) The Court may, on the application of any member of the company, restrain the directors from entering into a transaction in contravention of subsection (1).
- B** (3) Where an arrangement or transaction is carried into effect in contravention of subsection (1), the arrangement or transaction shall be void except in favour of any person dealing with the company for valuable consideration and without actual notice of the contravention.
- C** (4) This section shall not apply to proposals for disposing of the whole or substantially the whole of the company's undertaking or property made by a receiver and manager of any part of the undertaking or property of the company appointed under a power contained in any instrument or by a Court or a liquidator of a company appointed in a voluntary winding up.
- (5) Any director who contravenes this section shall be guilty of an offence against this Act.
- D** Penalty: Imprisonment for five years or thirty thousand ringgit or both.
- (6) In this section 'director' includes the chief executive officer, the chief operating officer, the chief financial controller or any other person primarily responsible for the operations or financial management of a company, by whatever name called.
- E** 24 What consideration and objects are lawful, and what not.
- The consideration or object of an agreement is lawful, unless —
- (a) it is forbidden by a law;
- F** (b) it is of such a nature that, if permitted, it would defeat any law;
- In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.
- G** (d) pursuant to s 132C of the Act, there had been a substantial disposal of the undertaking or property by the plaintiff in the sale of shares to the defendant as the value of transaction is RM17,500,000 as against RM40,000,000 being the issued paid up capital of the plaintiff;
- H** (e) as the agreement provides for purchase consideration of RM2,500,000 and assumption of liabilities totalling RM15,000,000, the actual purchase price of the shares bought by the defendant from the plaintiff is RM17,500,000;

THE PLAINTIFF'S SUBMISSION IN REBUTTAL

- I** [27] The plaintiff's grounds for opposing the defendant's application for striking out can be summarised as follows:
- (a) there is no substantial disposal of undertaking or property in the sales of the shares;

- (b) s 132C of the Act does not apply ie no general meeting is required as the value of transaction is only RM2,500,000 while plaintiff issued share capital stands at 40,000,000 shares at RM1 per share; A
- (c) even if it is true (although denied) that the assumption of liabilities totalling RM15,000,000 should be taken into account in forming the purchase price of the shares, there is no evidence that the defendant had actually assumed these liabilities; B
- (d) the sum RM15,000,000 is merely the potential liabilities that the defendant will assume and not any part of the consideration price which is RM2,500,000 as stated in the agreement; C
- (e) defendant in the defence and counterclaim says it is not obliged to assume any liabilities as such assumption is subject to due diligence and there must be a novation of contracts from plaintiff to defendant before the liabilities are assumed; D
- (f) the defendant cannot therefore approbate and reprobate in saying the assumption of liabilities at RM15,000,000 form part of the purchase price of the shares but at the same time saying it is not obliged to assume the liabilities as it is subjected to due diligence and a novation; E
- (g) the defendant cannot also approbate and reprobate in saying there is a need to call numerous witnesses to give testimonies as the matter involves areas of law which are complex as said in its application for security of costs and at the same time saying this is a plain and obvious case for striking out. F

THE LAW ON STRIKING OUT

[28] The Supreme Court in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 at held (1) said: G

It is only in plain and obvious case that recourse should be had to the summary process under this rule and the summary procedure can only be adopted when it can clearly seen that a claim or answer is on the face of it 'obviously unsustainable'. It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or defence. H

[29] The Court of Appeal also in *Metroplex Holdings Sdn Bhd v Commerce International Merchants Bankers Bhd* [2013] 4 MLJ 520 opined: I

Striking out is only adopted when it is conspicuously clear that the claim is obviously unsustainable.

- A [30] These cases suggest that only when a case is unsustainable, will the writ and statement of claim be struck out.

THE COURT'S FINDINGS

- B [31] There is no doubt that both parties in addressing this court on the application for striking out, had focused their submission on the applicability of s 132C of the Act and this court appreciates that the applicability of s 24 of the Contracts Act 1950 for this application, depends on whether the defendant could persuade this court that s 132C of the Act should be invoked.

- C [32] The defendant submitted since the value of transaction i.e. sale of shares by the plaintiff amounted to RM17,500,000 as against RM40,000,000 as plaintiff's issued paid up capital, the operation of s 132C of the Act is triggered, requiring a general meeting to be held by the plaintiff before the disposal of the shares.

- D [33] The defendant essentially saying the amount RM15,000,000 for liabilities to be assumed forms part of the purchase price to be added to the sum of RM2,500,000 for consideration price of the shares giving a total of RM17,500,000.

- E [34] The plaintiff in turn saying it is not true to say the shares value is RM17,500,000 as one only needs to look at the agreement to note that the price of the shares is only RM2,500,000, therefore s 132C of the Act is not applicable.

- F [35] Whether the value of the shares is RM17,500,000 or RM2,500,000 itself is an issue not determined at this stage by this court and parties are at liberty to call witnesses to convince this court one way or the other.

- G [36] It is important to note is at this stage, anyone looking at s 132C of the Act will not be able to find the wordings to the effect that liabilities to be assumed must form part of the purchase price to arrive at the possible conclusion that substantial undertaking or property has been disposed of by the company ie the plaintiff.

- H [37] Inversely, caution needs be given that this court, at this is stage, is not saying that liabilities to be assumed could not be included to form the purchase price of the transaction.

- I [38] More so when the decisions quoted by the defendant in *Azizi Yom Ahmad & Anor v Seacera Tiles Bhd & Ors* [2013] MLJU 278; [2013] 5 CLJ 605

and *Macon Works & Trading Sdn Bhd v Phang Hon Chin & Anor* [1976] 2 MLJ 177 did not specifically say that value of assumption of liabilities forms part of purchase price of transactions. A

[39] This court also could not agree at this stage that chapter 10.2 (m) of the Listing Requirement of Bursa Malaysia that says value of consideration includes any liability to be assumed applies to the plaintiff. This is simply because not only the defendant itself does not dispute the plaintiff has been delisted but the defendant itself too, assert the plaintiff has been delisted, therefore the said Listing Requirement cannot apply to the plaintiff. B
C

[40] Chapter 2.04 read together with chapter 2.01 and 2.02 of said listing requirement stipulate the listing requirement is only to apply to listed issuer for which the plaintiff is not.

[41] This is further supported as pointed out by the plaintiff by the Court of Appeal's decision in *Tengku Dato Kamal Ibni Sultan Sir Abu Bakar & Ors v Bursa (M) Securities Bhd and another appeal* [2013] 1 MLJ 158 where Ramly Ali JCA said: D

The LR has statutory force in the form of rules containing obligations and *requiring compliance by participating organisations* pursuant to the relevant laws particularly the CMSA 2007. *A listed issuer and all its directors must comply with the LR for so long as the listed issuer shall remain on the official list of the stock exchange.* E
(Emphasis added.) F

[42] There is more or less equal weight to the arguments of both plaintiff and defendant on this point. It is certainly not appropriate and safe for this court at this juncture to conclude that the defendant's submission on this issue should clearly be preferred over the contention of the plaintiff. G

[43] Also relevant to note is that s 132C(1B) of the Act as shown provides three methods to arrive at substantial value or substantial portion of the company's undertaking of property whichever is the highest. That would mean although three methods are stipulated only one should be applied. H

[44] And in this case, the defendant had chosen to submit that the highest is to look at the amount of transaction ie value of purchase price of the shares as against the issued share capital of the plaintiff and therefore, s 132C(1B)(c) of the Act is applicable. I

[45] Having submitted so, the defendant cannot say that the method in s 132C(1B)(b) should also apply because as clearly stated in the provision, only one method should be applied and that is where it is the highest.

- A** [46] Therefore for all the reasons adumbrated, this court is of the finding, this is not a plain and obvious case for striking out of the plaintiff's writ and statement of claim.

B THE DEFENDANT'S ARGUMENTS FOR SECURITY FOR COSTS

[47] The reasons for the application for security of costs by the defendant can be summarised as follows:

- C** (a) the plaintiff is impecunious;
- (b) at all material times, the plaintiff suffered losses;
- (c) the plaintiff was classified under Practice Note (PN17) Bursa Malaysia ('Bursa'); and
- D** (d) the plaintiff's shares were delisted from Bursa.

[48] The defendant submitted that the most important factor for this court to consider for this application is to bear in mind that the plaintiff does not dispute it is impecunious.

[49] Further, there is no evidence shown by the plaintiff that it can satisfy the defendant's costs if so ordered.

- F** [50] The fact that the plaintiff is impecunious is reflected in its audited accounts shown in the directors' report together with the financial statements for the financial year ended on 31 December 2011.

- G** [51] According to the defendant too, the plaintiff's shares were delisted from Bursa because it is impecunious.

[52] Further, the defendant's contention is that plaintiff was impecunious even before the agreement was signed as the same had negative tangible assets since 2011.

H THE PLAINTIFF'S SUBMISSION IN REBUTTAL

- I** [53] The plaintiff's submission in opposing the application for security for costs is summarised as follows:
- (a) the liabilities of the plaintiff were disclosed to the defendant and the defendant was given full and frank disclosure as to the plaintiff's financial position prior to signing of the agreement;

- (b) the defendant agreed to assume liabilities of the plaintiff and its subsidiaries; A
- (c) had the defendant fulfilled its obligations under the agreement, the plaintiff would not be in its current position;
- (d) it is inequitable for the defendant to use the plaintiff's financial standing as a basis for this application as it was the defendant itself which failed to honour the agreement. B

THE PLAINTIFF'S ADMISSION

C

[54] In the affidavit in reply affirmed for the plaintiff on 9 July 2013, the plaintiff admitted the following facts:

- (a) it together with most of its subsidiaries were suffering losses; D
- (b) there were outstanding payments on rental of a premise still unpaid where the plaintiff is the tenant;
- (c) there were debts due and owing to third parties; E
- (d) it was classified under Practice Note (PN17) Bursa;
- (e) its shares were delisted from Bursa.

THE LAW ON SECURITY FOR COSTS

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[55] As noted earlier in this judgment, the application for security of costs is made pursuant to s 351(1) of the Act which reads:

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Where a company is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it *appears* by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

H

(Emphasis added.)

[56] This court noted the word 'appears' in the section and would recognise that the word 'appears' denotes a lesser degree of probability than normally required in terms of proving a particular assertion. I

[57] The burden of proof on the part of the defendant to say that the plaintiff must provide the security is lessen in view of that word 'appears', '... appears by

- A credible testimony ...' cannot be the same as '... by credible testimony ...' Needless to say the word 'appears' is inserted by the legislature not for it to be superfluous or as a surplusage; there must be a reason for the addition of that word.
- B [58] Therefore this court would rule that 'appears' in the context of that section means evidence lesser than credible testimony.
- C [59] This view is not unsupported as the Court of Appeal in *Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v Bursa (M) Securities Bhd and another appeal* [2013] 1 MLJ 158 quoted with approval the Supreme Court of India's decision in *Pyare Lal Bhargava v State of Rajasthan* AIR 1963 SC 1094 where the relevant passage reads:
- D The crucial word in the first ingredient is the expression 'appears'. The appropriate meaning of the word 'appears' is 'seems'. It imports a lesser degree of probability than proof.
- E [60] Further support of the interpretation above is obtained from the decision of the Court of Appeal's in *Wan Muhamad Ibrisam bin Wan Ibrahim & Ors v Opal Pyramid Sdn Bhd* [2008] 6 MLJ 728; [2009] 1 CLJ 201 where it ruled on the application for security for costs under the same s 351 of the Act and where it is said;
- F The discretion ought not to be hampered by any new formulated concepts that tend to import *inhibitive demands* into s 351 of the Companies Act, 1965.
(Emphasis added.)
- G [61] The above decision means no inhibitive demand should be imposed on the interpretation of the section.
- H [62] Therefore this court takes the above passage to reinforce the understanding that insubstantial proof is required from the defendant for its application and as long as it can be shown that there is some credible testimony to believe that the plaintiff will be unable to pay the costs of the defendant in the event the defendant wins the case, the application for security of costs should be allowed.

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THE COURT'S FINDINGS

[63] This court is of the finding that indeed there is no denial that the plaintiffs is impecunious. More so when this court considers the admission by

the plaintiff as narrated. What is asserted by the plaintiff is merely that the plaintiff is in its current financial position because the defendant did not honour the agreement. A

[64] The assertion that the defendant failed to honour the agreement itself is still the subject of this case for trial. Therefore at this stage, it is still not determine whether the defendant could be held liable for the breach of the agreement if any. B

[65] Though the plaintiff's contention is that the defendant at all material times knew of the plaintiff's financial position, it must be realised that even if this is true, that knowledge as to the plaintiff financial standing was obtained by the defendant without the hindsight that there would be a civil suit filed by the plaintiff as is done now. C

[66] Only after the suit is filed, must the plaintiff be able to show that it has the means of satisfying the costs of the defendant in the event this court dismisses its claim. That duty on the plaintiff to disprove it is impecunious, after it is shown by the defendant it might be so, arises only after the suit is filed and not before. D E

[67] This court therefore is still troubled by the fact that there is no denial that the plaintiff is in fact impecunious.

[68] The documentary proof as shown indicates that the plaintiff and most of its subsidiaries profit is in the negative. As such this court could not possible ignore or take lightly what is already shown. Consequently this court is of the finding that because of the losses, there is some credible testimony that the plaintiff will be unable to pay the defendant's cost in the event that the defendant is held not liable. F G

[69] Equally important, taking into account the circumstances of the plaintiff's financial standing, there are very limited reasons for this court not to grant the application for security for costs in the face of the clear admissions of the plaintiff as narrated earlier. H

[70] Further, taking into account *Tengku Dato Kamal*, the defendant only needs to show some proof to assert security is needed from the plaintiff and based on the foregoing, it is the finding of this court there is sufficient proof and some credible testimony for the same. I

[71] This court also agrees that the amount requested RM250,000 as security for costs is a fair amount having regard to the amount claim in the

A counterclaim of the defendant.

THE DECISION

B [72] Based on all of the findings of this court as narrated, the application for summary judgment is dismissed with costs of RM3,000 for the defendant, the application for striking out is also dismissed with costs of RM3,000 for the plaintiff and application for security for costs is allowed with costs of RM3,000 for the defendant.

C [73] Order is made for plaintiff to deposit RM250,000 to the court for the security for costs within thirty days from today and all proceedings relating to the plaintiff's suit are stayed pending the provision of the same except defendant is to apply to court to proceed with its counterclaim after the disposal of the plaintiff's appeal if any on this order for security for costs.

D [74] The defendant is also at liberty to apply to court for the striking out of the writ and statement of claim of the plaintiff in the event the security for costs is not provided.

E *Order accordingly.*

Reported by Kohila Nesan

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